No. 5727

In the United States Circuit Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

vs.

EDWIN J. BUZARD, APPELLEE.

Upon appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE, EDWIN J. BUZARD

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STATEMENT OF FACTS.

Edward J. Buzard, plaintiff herein, in November, 1917, while in the U. S. Army, applied for and was granted War Risk Term Insurance in the sum of $10,000.00. Premiums were paid on same

to include the month of June, 1919. No premiums were paid thereafter.

The testimony shows, that on June 18, 1918, while the $10,000.00 War Risk Insurance was in effect, plaintiff was in service in France. At Belleau Wood the plaintiff was gassed and on being carried from front line trenches to the rear by his brother, was wounded by high explosives, rendered unconscious, sight destroyed, and he became totally and permanently disabled. (R. pages 45, 46, 51, 52). Plaintiff was invalided home and later discharged.

On March 15, 1920, plaintiff signed an instrument which he thought was to entitle him to the payment of his insurance due, but which later turned out to be a new Policy of converted insurance. Record P. 57). The case was submitted to the jury, and a verdict was returned finding the plaintiff permanently and totally disabled from June 30, 1919 (R. 16). Judgment on verdict entered Nov. 14, 1928 (R. 17 & 18) in favor of the Plaintiff.

Motion for new trial filed on October 9, 1928. The case is now on appeal from the U. S. District

Court, Western District of Washington, Northern Division.

The plaintiff contends that he never entered into a new contract of Insurance, and at no time was that his intention. Plaintiff further contends, that the $10,000.00 term insurance matured and became a liquidated demand on the date the plaintiff became permanently and totally disabled. He further contends that the alleged re-instatement and conversion following the lapse of the policy does not preclude him from asserting permanent and total disability during the life of the original $10,000 term contract. The defendant says that said reinstatement and conversion is an estoppel by contract. The plaintiff contends that the entire matter of estoppel was presented to the jury in all its phases and the jury determined in his favor.

ARGUMENT AND CITATIONS.

Part I.

PLAINTIFF'S $10,000 TERM INSURANCE MATURED AND BECAME A LIQUIDATED DEMAND ON THE DATE THE PLAINTIFF BECAME PERMANENTLY AND TOTALLY DISABLED.

The defendant does not deny that the plaintiff became and was totally and permanently disabled since June 30, 1919 during the life of the $10,000 policy and continued until the date of this trial, and the JURY SO FOUND. Being totally and permanently disabled from date of discharge while his $10,000 policy was in full force and effect, this contract of War Risk Insurance matured by the happening of the contingency for which the policy issued and plaintiff was entitled to receive from defendant the amount stipulated in this contract. He could have sued upon this contract at any time from date of discharge, had he knowledge of or been apprised of his rights.

In the case of U. S. v. Cox 24 Fed. (2nd) 944, C. C. A. 5th Circuit, Foster Judge, says:

> "However, the payment of premiums after his discharge from service was not required if he was at that time totally and permanently disabled within the meaning of the law AS THE POLICY WAS THEN MATURED, and all the premiums due had been paid.

Also in Larsen v. U. S. 29 Fed. (2nd) 847, a case in point with this one, court says:

> "There can be no doubt as to the fact that the deceased was totally and permanently disabled on the date of discharge. This condition ma-

tured the policy and he became entitled to the payment of 240 monthly payments of $57.50 each from the date of discharge."

"The defendant on permanent and total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the payment, even though it may have been through a reissued policy in lieu of the old does not change the status nor bar plaintiffs claim to the balance.

In Dobbie v. U. S. 19 Fed. (2nd) 656, where the court says:

"A true estoppel does not arise in this case as the Government has lost nothing and if as the jury found the plaintiff has been totally and permanently disabled, her policy has been A LIQUIDATED DEMAND since that date."

Andrews v. U. S. 28 Fed. (2nd) 904.

"In fact and at law the policy sued on had already matured, and the soldier was at that time entitled to recover the face of the policy."

The defendant says, that, by reason of the conversion of $5,000 of the original policy of War Risk Insurance, the plaintiff is hereby estopped from asserting permanent and total disability during the life of the original $10,000.00 term contract, (Govt.' Brief P. 13). Is there an estoppel? The contract had already matured and the rights were

fixed prior to alleged conversion. What need would plaintiff have had for reinstatement had he been fully apprised of his rights? Would a person who had $10,000 due from the defendant deliberately throw away $10,000.00 and ask for only $5,000 of his money then due? The answers to these questions are apparent.

The Attorney General's opinion, (32 Ops. Atty. Gen. 379, 386, 389, 390,) quoted in appellants Brief, P. 12, stated:

> "THE TERM POLICY HAVING MATURED INTO A CLAIM BY THE HAPPENING OF THE EVENT INSURED AGAINST IT, CEASES TO CONSTITUTE "INSURANCE".
>
> To concede that one totally and permanently disabled may convert term insurance into a new form of insurance, would be to admit, one similarly disabled may take out, term insurance, and that as I have heretofore stated in opinion of July 18, 1919, (31 Ops. Atty. Gen.) he may not do.

In the case at bar the jury found the plaintiff on the date of conversion to be totally and permanently disabled, under the opinion as set forth above, the policy was matured and plaintiff under this opinion could not take out a new policy of insurance.

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In the case at bar the jury found the plaintiff on the date of conversion to be totally and permanently disabled, under the opinion as set forth above, the policy was matured and plaintiff under this opinion could not take out a new policy of insurance.

Part II.

PLAINTIFF IN SIGNING APPLICATION FOR RE-INSTATEMENT DID SO THROUGH MISTAKE AND WITHOUT INTENTION TO ENTER INTO A NEW CONTRACT.

The plaintiff in signing application to re-instate his policy was working under a mistake of fact, either as to the extent of his disability or his rights under this contract, which precludes the formation of a new contract.

There was no meeting of the minds for there can be no mutual consent where there is a mistake of fact and mistake of fact is occasioned by ignorance of the real facts, as is said in 13 C. J. at P. 369.

> "Since mutual consent is essential to every agreement and agreement is generally essential to contract there can as a rule be no binding contract where there is no real consent. Apparent consent may be unreal because of mistake, misrepresentation, fraud and duress."

And also 13 C. J. at P. 369.

> "Mistake is occasioned by ignorance or misconception of same matter, under the influence of which an act is done.

A MISTAKE OF FACT TAKES PLACE WHEN SOME MATERIAL FACT, WHICH REALLY EXISTS IS UNKNOWN, OR WHEN

SOME ESSENTIAL FACT WHICH IS SUPPOSED TO EXIST REALLY DOES NOT EXIST."

The Court in Larsen v. U. S. Fed. (2nd) 847, says the following in regard to mistake:

"The answer seeks enforcement of the reissued $2,000 converted policy, instead of the $10,000 and to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just not only in its terms but in the circumstances, Nevada Nickel Co. (C. C.) 96 Fed. 135, at P. 145; and where it is unconscientious or unreasonable, 30 U. S. 264; or the disproportion so great as to shock the conscience, (154 Fed. 481), or where the disparity is gross, equity will not enforce relief. 88 Wash. 112, all of the disclosed circumstances show that this claim as said by the Sup. Court, 89 U. S. 496, is utterly destitute of merit and repugnant to the plainest dictates of both law and justice."

The uncontroverted testimony shows that it was not the intention of plaintiff, Buzard, to elect to re-instate the policy.

Plaintiff Buzard testified:

"Mr. Mace, (man who presented the application for reinstatement) did not say anything to me; he says, "sign this—this is all there is to it", and I says, "if it does my family any good, why, all right, "but I WAS UNDER THE IMPRESSION AT THE TIME THAT I WAS SIGNING TO GET MY GOVERNMENT IN-

SURANCE PAID TO ME, NOT FOR ME TO TAKE OUT MORE INSURANCE. (R. 57).

In Stevens v. United States, 29 Fed. (2nd) P. 904, quoted at length by the U. S. attorneys, Van Valkenburg, Judge, writing the opinion in the Stevens case, which held an estoppel, used the following language in commenting on the case of Dobbie v. U. S. 19 Fed. (2nd) 656.

> "That case, (meaning Dobbie case) however, may be easily distinguished from the fact that THE COURT FOUND THAT THE PLAINTIFF DID NOT INTEND TO MAKE THE ELECTION TO RE-INSTATE THE POLICY."

The jury in the case at bar found Buzard totally and permanently disabled on June 30, 1919; that the old contract of insurance prevailed and that no new contract was entered into and that the plaintiff had not elected to re-instate.

Buzard stated that he had no intention to get more insurance but only desired payment of insurance already had. (R. 57). Had the same facts prevailed in the Stevens case as prevailed in the Dobbie case or the case at bar, clearly the decision of the court would have been with the plaintiff.

Part III.

PLAINTIFF IS NOT ESTOPPED TO ASSERT HIS RIGHTS UNDER THE $10000. POLICY OF WAR RISK TERM INSURANCE BY THE ISSUANCE OF A $5000. CONVERTED POLICY OF INSURANCE.

Estoppel will not lie in the present case. The matter was presented to the jury and the findings were that the plaintiff did not make statements knowingly false: that the government was not misled or suffered any damage or that there was any benefit or right accruing to the plaintiff in the issuance of the $5000. converted policy.

The present case is squarely in point with Andrews v. U. S. 28 Fed. (2nd) 904, wherein the court says:

> "The question of estoppel was submitted to the jury and by their verdict the jury has found that the statements made were not knowingly false, and that the Government was not misled thereby."

So in the present case the question of estoppel was at issue and submitted to the jury, with the other facts in the case, and the jury returned the verdict in favor of the plaintiff. The court in

Andrews v. U. S. 28 Fed. (2nd) 904, in continuing says:

> "Moreover, the Government was not misled. The Government had a complete record of his case and through its Doctor's probably knew more about the question of whether his disability was total and apt to be permanent than did the soldier himself. In any event it is quite clear the Government cannot contend that it was misled by the statement of the soldier."

And in the Larsen case 29 Fed. (2nd) 847.

> "The condition of the deceased was known to the defendant. He was in U. S. Hospitals. All medical diagnosis were in its possession and all show deceased physical condition."

In this case the Government provided a reader for the plaintiff, Buzard.

As was said in the Larsen case, 29 Fed. (2nd) 847, and is in reality a statement of fact as in case at bar,

> "There was no benefit of right accruing to the plaintiff or damages to the defendant. (Brooks & White, 2 Met. Mass. 283, 37 Amer. Dec. 95). The defendant lost nothing, Struck & Co. v. Slicer, 23 Ga. App. 52, 97 S. E. 455; Ala. App. 335; 62 So. 245; 147 Minn. 433, 180 N. W. 540; and plaintiff gained nothing. See 78 Fed. (2nd) 373.

And in the Dobbie case, 13 Fed. (2d) 212, as herein.

> "A true estoppel does not arise in this case, as the Government has lost nothing."

And in the Larsen case as in this case:

> "The plaintiff did not know his legal status and right, and I think, upon the record, the court must find, relied upon the Bureau."

Can the defendant be now heard to say that by reason of the reinstatement and conversion it was misled and injured? Defendant having possession of the facts should be estopped from denying that plaintiff was totally and permanently disabled at the date of discharge which frees both parties. As is said at 21 C. J. (1139 P. 140) 8.

> "Where an estoppel exists against an estoppel the matter is set at large. It may happen that a plaintiff being estopped to allege a state of facts which the defendant is estopped to deny, the interest of justice will require that both be liberated."

The defendant had the record of the plaintiff's case, the result of medical examination in the plaintiff's file which was in the possession of the defendant. The defendant had access to these files, the plaintiff under the law did not have access to same.

If the defendant had better opportunity to judge

of the disability of the plaintiff than the plaintiff himself; if the Government saw fit to enter into a contract with the plaintiff knowing that the contract could not be made with a man totally and permanently disabled and was deceived as to his physical condition, with all the records, medical and otherwise, available and at their disposal, and were mistaken, how then can they hold that the plaintiff was at fault in not knowing his true condition and asked that he be estopped from denying said contract.

Part IV.

The case at bar is distinguished from the Stevens case in several particulars;

In the Stevens case the evidence is that Stevens was not totally disabled at the time of reinstatement or at any time prior to trial. Medical testimony for the plaintiff Stevens was;

> "At no time did I think he was totally disabled until the present time. (Time of trial).

Other medical testimony that at the time of trial the disability was total and permanent. "Their testimony goes no further than that." Stevens was competent to contract. Buzard, without know-

ing it, and the jury so found, was incapable of contracting and it was shown he had not intention of contracting.

In deciding the Stevens case the court distinguished between that case and the Dobbie case, 19 Fed. (2nd) 656.

> "A contrary view is expressed by the District Court, Southern District of Texas, in Dobbie vs. United States, 9 Fed. (2nd) 656. *That case however, may be easily distinguished from the fact that the Court found that plaintiff did not intend to make the election to reinstate the policy.*"

Buzard, this case, did not elect to reinstate or enter into a new contract. As was stated, "But I was under the impression that I was signing to get my Government insurance paid to me, not for me to take out more insurance." (R. 57).

This clearly brings the case at bar under the Dobbie decision rather than the Stevens case; Also, "I did not apply for reinstatement on March 2nd, 1920, of $5,000 of my insurance."

Facts further disclose that in the Stevens case a full explanation was made to Stevens by an ex-Veteran Bureau employee whom the court found honest and having best interests of Stevens in

mind. In case at bar, speaking of the application papers, Buzard testified: "I did not apply for conversion of $5,000 of my Insurance, it was brought to me to sign by Fred Mace. He made them out himself and brought them to me to sign, is as much as I know."

The fact that Buzard did not make election to reinstate his policy of insurance; the fact that he was totally and permanently disabled while his $10,000 policy was in effect and continuing to the date of his trial; the fact that he did not himself personally make out the application and there is no evidence to show that he read same or knew the contents of said application, clearly places the case at bar under the decision of the Dobbie case rather than the Stevens case.

The plaintiff has established and the defendant does not deny that the plaintiff was totally and permanently disabled during the time his $10,000 policy of insurance was in effect. At any time subsequent to that date this suit of law could have been maintained. No advantages accrued to the plaintiff under this new contract and the defendant did not become liable under the reinstated policy. The jury found the plaintiff was totally and

permanently disabled at the time the converted policy was issued. A suit on the converted policy, determined by the same jury in this case would have found that the plaintiff at the time of the issuance of the re-instated policy was totally and permanently disabled. It being one of the prohibitions under said policy, the court would naturally find that since the plaintiff was totally and permanently disabled at the time of the issuance of converted policy, and this being prohibited under said policy, that there never was any contract and the plaintiff could not recover. In other words no contract of converted insurance was consumated.

Estoppel would not lie in the case at issue. No damages were sustained or benefits or rights accrued. The trial Court did not err in entering judgment on the verdict of the jury for the installments payable on the $10,000. insurance and the judgment entered herein should be affirmed.

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